SAMINATHAN RAMASAMY

v.

RUKUMAN MARJUKI & ANOR

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL JC
[CIVIL SUIT NO: 23-7 OF 1990]
27 MARCH 1997

CIVIL PROCEDURE: *Parties - Addition of co-defendant - Discretion of court - Whether court could add a co-defendant against wishes of plaintiff - Circumstances in which a co-defendant could be added as party - Rules of the High Court 1980, O. 15 r. 6, O. 21 r. 3*

The plaintiff was riding pillion on a motorcycle ridden by one Selvaraj when a collision occurred with the defendant, also riding a motorcycle. The plaintiff commenced proceedings against the defendant, whereupon the defendant pleaded that the accident was caused by the negligence of Selvaraj. The defendant then applied for an order that Selvaraj be added as a co-defendant pursuant to O. 15 r. 6(2)(b) Rules of the High Court 1980 ('the RHC'). Consenting to the application, the plaintiff filed an amended writ and added Selvaraj as the second defendant. The plaintiff also amended his statement of claim so as to incorporate a claim against Selvaraj for negligence. Subsequently, however, the plaintiff changed his mind and decided not to proceed against Selvaraj. And thus, when the case came up for hearing, and after Selvaraj had filed his defence, the plaintiff made an oral application to withdraw the action against Selvaraj and thereafter filed a notice of discontinuance of the action. The defendant, in the meanwhile, applied to set aside the notice of discontinuance. The application was allowed as the plaintiff had filed the notice of discontinuance without the leave of court as required by O.21 r.3 of the RHC. The plaintiff, in the circumstances, applied for leave to discontinue the action against the second defendant Selvaraj. The issue for consideration was in relation to the circumstances in which a plaintiff could be compelled to add a person as a co-defendant.

Held:

[1] When an application is made by the defendant to add a co-defendant against the wishes of the plaintiff, the application must be limited to matters arising in the pleadings *ie*, the statement of claim must disclose a case against the proposed co-defendant. In any event the court has a general discretion to add a co-defendant against the wishes of the plaintiff.

[2] Based on the facts, the plaintiff had consented to the addition made by the defendant. The statement of claim was accordingly amended to allege negligence against the second defendant who then promptly filed a statement of defence. It was therefore now too late in the day for the plaintiff to resile. The defendant could add the co-defendant against the wishes of the plaintiff.

[Application dismissed.]

Case(s) referred to:
Abidin Umar v. Doraisamy & Anor [1994] 2 CLJ 747 ***(refd)***
Amon v. Raphael Tuck Sons Ltd [1956] 1Q 357 ***(refd)***
Courtney v. Woods [1946] NZLR 350 ***(refd)***
Dollfus Mieg Et Compagnie SA v. Bank of England [1950] 2 All ER 605 ***(refd)***
Gartner v. Circuit [1968] 2 QB 587 ***(cit)***
Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 ***(refd)***
Hee Awa & Ors v. Syed Muhammad Sazalay & Anor [1988] 1 MLJ 300 ***(refd)***
Horwell v. London General Omnibus Co [1877] 2 Ex D 365 ***(cit)***
Mc Cheane v. Gytes [1902] 1 Ch 911 ***(cit)***
Pegang Mining Co Ltd v. Choong Sam & Ors [1969] 2 MLJ 52 ***(refd)***
Qantas Airways Ltd v. AF Little Pty Ltd [1981] 2 NSWLR 34 ***(refd)***
Re Vendervell's Trusts [1969] 3 All ER 496 ***(refd)***
Tajjul Ariffin Mustaffa v. Heng Cheng Hong [1993] 3 CLJ 117 ***(foll)***
Vandervell Trustees Ltd v. White [1971] AC 912 ***(refd)***
White v. Carrara Ceiling Co [1944] NZLR 577 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 15 rr. 2(b)(i), (ii), 6(2)(b), 9, O. 16, O. 21 r. 3

For the plaintiff - Rajandas Sankar; M/s GTS & Americk Sidhu
For the defendant - Lai Kuan Jean; M/s Taye & Co
For the 2nd defendant - Krishna Dallumah; M/s Krishna Dallumah & Co

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul J:

On 19 December 1987 Saminathan Ramasamy (the plaintiff) was riding pillion on motorcycle bearing registration number NY 2058 ridden by one Selvaraj P. Ponnusamy. At 20½ milestone, Jalan Masjid Tanah/Lubok Cina there was a collision between this motor-cycle and motor-cycle bearing registration number MJ 4043 which was ridden by Rukaman bin Marjuki (the defendant). As a result of the collision the plaintiff sustained injuries. He then commenced proceedings against the defendant for damages by his writ filed on 28 July 1990. He did not institute any proceedings against the rider of the motor-cycle

on which he was travelling. The defendant filed his memorandum of appearance on 11 February 1991 and his defence on 12 March 1991. In the defence the defendant pleaded, *inter alia*, that the accident was caused by the negligence of Selvaraj P. Ponnusamy. The smooth flow of the case was then interrupted by a series of applications and counter applications.

By his application filed on 19 March 1991 the defendant applied for an order that Selvaraj P. Ponnusamy be added as a co-defendant pursuant to O. 15 r. 6(2)(b) of the Rules of the High Court 1980. The defendant also prayed for a consequential order that "pihak plaintiff memfailkan dan menyerahkan pernyataan tuntutan pindaannya yang mengandungi 'butir-butir kecuaian' defendan tambahan atau secara alternatif terima pakai butir-butir kecuaian yang dicatitkan dalam pernyataan pembelaan defendan dalam tempoh tiga minggu daripada tarikh perintah ini."

The plaintiff opposed this application on the ground that he cannot be compelled to add Selvaraj P. Ponnusamy as a co-defendant and that he cannot be forced to amend his statement of claim to plead that the rider of motorcycle NY 2058 was negligent. However, when the application came up for hearing on 17 December 1991 the plaintiff consented to it and a consent order was entered accordingly. The plaintiff then filed his amended writ on 28 January 1992 with Selvaraj P. Ponnusamy added as the 2nd defendant. The statement of claim was also amended to incorporate a claim against the 2nd defendant for negligence together or in the alternative with that of the 1st defendant. It was served on the 2nd defendant on 7 February 1992 who then filed his defence on 5 March 1992.

On 22 October 1993 when the case came up for hearing learned counsel for the plaintiff made an oral application to the court to withdraw the action against the 2nd defendant. Learned counsel for the 1st defendant objected saying that the 2nd defendant had been made a party by the 1st defendant. The plaintiff then withdraw the application and the case was refixed for hearing from 18 to 20 May 1994. The case did not proceed on that date or on 6 September 1994 when it had been fixed for hearing again. On 27 December 1994 the 2nd defendant filed an application praying for an order that the claim against him by the plaintiff be dismissed with costs. One of the objections raised by him was that the application to add him as a party was not served on him. This application was heard by the learned senior assistant registrar who dismissed it with costs on the ground, as gathered from the court file, that the 2nd defendant, by entering an unconditional appearance had waived the irregularity. There was no appeal against this order.

Then on 13 February 1996 the plaintiff filed a notice of discontinuance against the 2nd defendant. On 20 August 1996 the 1st defendant applied for an order of committal against the plaintiff on the ground that he had abused the process of the court. This application was withdrawn on 17 September 1996. In the meanwhile on 11 September 1996 the defendant made an application to the court to set aside the notice of discontinuance filed by the plaintiff. I allowed the application with costs as the plaintiff had filed the notice of discontinuance without leave of court as required by O. 21 r. 3 of the Rules of the High Court 1980.

The application now before me is by the plaintiff praying for leave to discontinue the action against the 2nd defendant. It was affirmed in the affidavit-in-support, after setting out the sequence of events that had transpired, that the 2nd defendant had no objections to the application. Paragraph 15 of the affidavit reads as follows:

> In the circumstances, it is the Plaintiff's desire not to proceed against the 2nd Defendant, who has no objections to the Plaintiff's claim being withdrawn against him with no order as to costs. I verily believe that the 1st Defendant will not be prejudiced by this as he has the opportunity and the right in law to commence 3rd party proceedings against the 2nd Defendant.

The material parts of the plaintiff's affidavit-in-reply read as follows:

> Tujuan permohonan Plaintiff ini adalah untuk mendapat gantirugi semata-mata daripada Defendant Pertama walaupun jika diteliti repot-repot polis, rajah kasar dan kunci serta gambar-gambar kemalangan, Defendant Kedua adalah lebih cuai. Saya memohon izin Mahkamah yang mulia ini untuk merujuk kepada Ikatan Dokumen Plaintif yang bertarikh 21.10.93 di muka surat 3 hingga 10.
>
> Defendant Pertama mengalami prejudis jika permohonan plaintif ini dibenarkan sebab dengan adanya Defendan Kedua, Defendan Pertama hanya perlu membayar setakat mana beliau bertanggungan. Manakala jika defendan kedua dijadikan pihak ketiga pun, defendan pertama perlulah menanggung sepenuhnya dan kemudiannya cuba mendapat indemniti atau sumbangan daripada Pihak Ketiga.

In her submission before me learned counsel for the defendant contended that 2nd defendant was made a party pursuant to a consent order between the 1st defendant and the plaintiff and that the court is now *functus officio.* She added that if the application is allowed it amounts to setting aside the consent order. In support of her argument she referred to *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143 where the Federal Court held that a court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as is necessary to correct

errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing. She further submitted that if the 2nd defendant remains as a party then liability will be apportioned. If he were to be brought in as a third party then the 1st defendant can only seek indemnity from him. This, she said, will amount to no indemnity as the 2nd defendant is not a man of any means. Learned counsel for the plaintiff contended that the plaintiff was compelled to enter into the consent order in the light of the judgment of the Supreme Court in *Hee Awa & Ors v. Syed Muhammad Sazalay & Anor* [1988] 1 MLJ 300. He also said that if a defendant is allowed to join another person as a co-defendant against the wishes of the plaintiff then it amounts to the defendant dictating who the plaintiff should sue.

The first matter for consideration is the circumstances in which a plaintiff can be compelled to add a person as a co-defendant. This is governed by O. 15 r. 2 of the Rules of the High Court 1980 which reads as follows:

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application -
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> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
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> (b) order any of the following persons to be added as a party, namely -
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> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters may be affectually and completely determined and adjudicated upon, or
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> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of, or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter, but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

In *Dollfus Mieg Et Compagnie SA v. Bank of England* [1950] 2 All ER 605 the English Court of Appeal dealt with the principles governing the addition of a defendant against the wishes of the plaintiff. Wynn Parry J stated the general rule that in common law and chancery matters a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone. He cannot be compelled to proceed against other persons whom he has no desire to sue. Edgar Joseph Jr FCJ accepted this proposition of law in *Tajjul Ariffin bin Mustaffa v. Heng Cheng Hong* [1993] 2 MLJ 143 and said at p. 151:

> Generally, in common law and chancery matters, a plaintiff who considers that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone and he cannot be forced to pursue his remedy against other persons who he has no wish to sue (See per Wynn - Perry J in Dollful Mieg at *Compagnie SA v. Bank of England* [1951] 1 Ch 33).

In amplification of this general rule his Lordship said at p. 154 that a plaintiff cannot be forced, upon the application of the defendant, to have a second defendant added, against whom he does not wish to proceed for the reason that the negligence of the intended second defendant is not an issue involved in the claim he has made (*Mc Cheane v. Gytes* [1902] 1 Ch 911); *Horwell v. London General Omnibus Co* [1877] 2 Ex D 365; *White v. Carrara Ceiling Co* [1944] NZLR 577) and so he should be allowed to proceed against the defendant of his choice (*Courtney v. Woods* [1946] NZLR 350). His Lordship added that there may be cogent reasons for his not wanting to proceed against the intended second defendant; for example, the intended second defendant, who is alleged by the defendant to have been wholly or partly at fault, may be a friend or next of kin of the plaintiff, or the joinder may result in unnecessary prolongation of the trial or in the plaintiff having to shoulder the burden of additional costs should he fail against both the defendants.

There are exceptions to the general rule. Wynn Parry J listed them out in the *Dollfus* case at p. 609 in this way:

> There are, however, certain exceptions to the general rule, conveniently divided in The Annual Practice, 1949, p 254, into three classes, and prefaced - in my view, accurately - with the words: "Generally speaking, intervention can only be insisted upon in three classes of case." The first of these three classes is a representative action where the person seeking to intervene is one of a class whom the plaintiff claims to represent and the intervener is unwilling that the plaintiff should represent him. In such a case the intervener can insist on being added as a defendant. The second class of case is where the proprietary rights of the intervener are directly affected by the proceedings. The third class of case concerns actions for specific performance of contracts where third parties have an interest in the question of the manner in which the contract should be performed.

In saying that the exceptions are not exhaustive Wynn-Parry J added at p. 610:

> The authorities furnish instances of when intervention will be allowed and when it will not, and from those authorities the general rule embracing the three classes in question has been evolved, but in no case has the court attempted to lay down in an exhaustive statement all the cases in which the Court will allow or refuse applications for the joinder of new defendants.

Edgar Joseph Jr FCJ in examining the reasons that led to the addition of the co-defendant as a party in *Hee Awa* against the wishes of the plaintiff also recognised the fact that there are exceptions to the general rule when he said in *Tajjul Ariffin* at p. 151 that:

> Nevertheless, a person who is not a party may be added as a defendant over the objections of the Plaintiff on his own intervention or upon the application of the defendant or in some cases by the court of its own motion (See 1 Supreme Court Practice (1991) at p 193 para 15/6/71).

In this regard Abdul Malik Ishak JC (as he then was) analysed *Tajjul Ariffin* eloquently in *Abidin bin Umar v. Doraisamy & Anor* [1994] 1 MLJ 617 and said at pp 621-622,

> In *Tajjul Afiffin bin Mustafa v. Heng Cheng Hong*, [1993] 2 MLJ 143 KC Vohrah J had to consider the question, on an appeal, whether the defendant, in an application for joinder of a co-defendant, could compel the plaintiff to amend the statement of claim by pleading negligence. Within a narrow compass, the facts in *Tajjul Ariffin* can be stated thus. The plaintiff who was the pillion rider on a motor-cycle had sued the defendant for damages arising out of a road accident. In due course, the defendant made an application for the following prayers:
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> (1) the joinder of the rider of the motor-cycle, Lim Ah Chooi, and the owner of the motor-cycle, Lim Yu Hua, as co-defendants;
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> (2) for the plaintiff to amend the statement of claim to add the names of Lim Ah Chooi and Lim Yu Hua;
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> (3) for the plaintiff to amend the statement of claim to plead negligence against Lim Ah Chooi and Lim Yu Hua; and
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> (4) for the incidental or related matters.

The plaintiff had no objection to the defendant's application except for the application in prayer (3). The Sessions Court Judge allowed all the applications except for prayer (3) where she held that she could not compel the plaintiff to plead negligence against the intended co-defendant as this would involve substantive rather than procedural law. On appeal, KC Vohrah J agreed with the sessions court judge and dismissed the appeal. The case went up to the Supreme Court where it was held, *inter alia,* that a plaintiff cannot be forced, upon the application of the defendant, to have a second defendant added, against whom he does not wish to proceed for the reason that the negligence of the intended second defendant is not an issue involved in the claim he has made. But the Supreme Court in coming to this decision analysed *Hee Awa* and *Chan Yee* microscopically and drew a fine distinguishing mark when Edgar Joseph Jr SCJ said (at p. 153):

> It is in the light of these principles that the cases of *Hee Awa* and *Chan Yee*, should be considered. In other words, the judgment in those cases should be read in the light of the facts of those cases and not as imposing any fetter on the exercise of the discretion given to a judge when considering an application by the defendant for joinder of a defendant, over the objections of the plaintiff, in any new case.

In another part of his judgment at (p. 152), Edgar Joseph Jr SCJ said:

> It follows, that if judges were to attempt to lay down any general rule for the exercise of a discretion created under the relevant rule of the court then, as was pointed out by Brett MR in The Fridberg 10 p. 112 at p. 113 they would be trying to fetter their own discretion and that of their successors which they would have no legal power to do. Again, in another part of his judgment (at p. 153), Edgar Joseph Jr SCJ said:
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> > ... in so far as the power of the court to add a defendant on the application of the defendant against the wishes of the plaintiff is concerned, the jurisdiction of the court is entirely discretionary and the only fetter which RHC O. 15 r. 6(2)(b)(ii) places upon the exercise of the discretion which it gives to the judge of first instance is that it shall be exercised when there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between the person sought to be joined and that party as well as between the parties to the cause or matter.
> >
> > In short, the Supreme Court in *Tajjul Ariffin* did not fetter the discretionary power of the court of first instance to add a co-defendant upon the application of the defendant against the wishes of the plaintiff.

What now arises for deliberation are the applicable principles governing the addition of a co-defendant against the wishes of a plaintiff. The construction of O. 15 r. (2)(b)(i) and (ii) would play a critical role in the manner of exercising the discretion to add a co-defendant. In this regard reference may be made to *Amon v. Raphael Tuck Sons Ltd* [1956] 1Q 357 where Devlin J said at p. 380,

> The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party.

This construction was adopted in *The Result* [1958] p. 174 and was approved by the House of Lords in *Vandervell Trustees Ltd v. White* [1971] AC 912 when it allowed an appeal from the Court of Appeal which had refused to adopt Devlin J's view. In the *Amon* decision where the application to intervene

was made against the will of the plaintiff Devlin J laid down the following test to be followed: would the order for which the plaintiff was asking directly affect the intervener, not in his commercial interest, but in the enjoyment of his legal rights? This test was overruled by the Court of Appeal in *Gartner v. Circuit* [1968] 2 QB 587. This was endorsed by the Privy Council in *Pegang Mining Co Ltd v. Choong Sam & Ors* [1969] 2 MLJ 52 in the following terms:

> It has been sometimes said as in *Moser v. Marsden* [1892] 1 Ch 487 and In re 1 G Farbenindustrie AG (1944) Ch 41 that a party may be added if his legal interests will be affected by the judgment in the action, but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way or other than another is not a sufficient grounds to entitle him to be added as a party, they do not find the dichotomy between 'legal' and 'commercial' interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

The test formulated by the Privy Council in the *Pegang Mining Co Ltd* case was accepted by the Supreme Court in *Hee Awa & Ors v. Syed Muhammad Sazalay & Anor* [1988] 1 MLJ 300. Glass JA in referring to the authorities on the subject said in *Qantas Airways Ltd v. AF Little Pty Ltd* [1981] 2 NSWLR 34 at p. 37:

> But it is to be observed that in *Amon* [1956] 1 QB 357, and in all the subsequent decisions which approved it with or without notification, the application of the rule was being considered in a context where a third party was seeking to intervene over the opposition of the Plaintiff. It is no doubt proper in such a factual context to judge the necessity for adding a new defendant in terms of the matters in dispute raised by the plaintiff. But the existence or otherwise of a relationship of necessity is to be judged in an altogether different manner when it is the plaintiff who seeks to add a defendant.

And at p 38,

> Where a plaintiff applies to add a defendant the phrase 'all matters in dispute in the proceedings' should not be construed as limited to matters arising on the existing pleadings. It may also properly include those disputed issues of fact which are subjacent to the Pleading.

It is therefore clear that when the application is made by the defendant to add a co-defendant against the wishes of the plaintiff the application must be limited to matters arising in the pleadings, that is to say, the statement of claim must disclose a case against the proposed co-defendant. It was for this reason that the Supreme Court ruled in *Tajjul Ariffin* that a plaintiff cannot be compelled

to amend his pleadings to accommodate an intended co-defendant. Thus O. 15 r. 9 of the Rules of the High Court 1980 which authorises consequential amendments to the writ following an order made under r. 6 must be read as being limited to formal amendments only.

Notwithstanding what I have said the court has a general discretion to add a co-defendant against the wishes of the plaintiff. In this regard Wynn - Parry J said in the *Dollfus* case at p. 613:

> I find nothing in those authorities which would prevent me from taking the view that there is a general discretion in the Court, if it thinks right, having regard to all the circumstances, to bring in an intervener so that the question involved in the action may be completely adjudicated on and settled.

The above passage is now reflected in O. 15 r. 2(b)(ii) which is couched in wider language than r. 2(b)(i) and bears a close affinity to third party proceedings under O. 16. Rule (2)(b)(ii) is an adoption of the wider interpretation given to r. (2)(b)(i) by the Court of Appeal in *Re Vendervell's Trusts* [1969] 3 All ER 496 which was rejected by the House of Lords. However r. 2(b)(ii) cannot be used as a substitute for third party proceedings in all cases as it clearly states that a person may be added as a party only if "... it would be just and convenient ..." to do so. It must be observed that such words of limitation do not appear in O. 16.

The order joining the co-defendant as a party in *Hee Awa* was based on the peculiar circumstances of that case. In that case, the injured passenger of a government van had sued the motor-cyclist in the sessions court arising out of a collision involving the van and the motor-cycle. The van driver and the Government of Malaysia were made third parties. The pillion rider on the motor-cycle was killed as a result of injuries he had sustained in the collision and his parents and administrators of his estate sued the van driver and the Government of Malaysia in the High Court claiming damages. The van driver and the Government of Malaysia then applied under O. 15 r. 6(2)(b) of the Rules of the High Court 1980 for an order that the motor-cyclist be joined as a co-defendant. The application was dismissed by the senior assistant registrar. This order was reversed by the High Court on appeal which ordered that the motor-cyclist was to be added as a co-defendant. The parents and the administrators then appealed to the Supreme Court. In dismissing the appeal Mohammad Azmi SCJ said at p. 302,

> The learned Federal Counsel had informed the Court below that the respondents would be applying for consolidation of the two actions. In the circumstances, the order allowing the motor-cyclist to be joined as co-defendant is to ensure that all matters in dispute in the cause be 'effectually and completely determined and adjudicated upon' as envisaged by Order 15 rule 6(2)(b) RHC.

For the above reasons, the learned judge did not err in law in exercising his discretion in favour of the respondents. We would, therefore, dismiss this appeal with cost.

I interpolate to add that if the original application by the defendant dated 19 March 1991 was before me for hearing I would have dismissed it for the following reasons:

(i) the plaintiff should be allowed to proceed against the defendant of his choice;

(ii) the negligence of the intended 2nd defendant is not an issue involved in the claim he has made as the statement of claim does not disclose any case against him;

(iii) the proper procedure ought to have been to bring in the 2nd defendant as a third party though he can be added as a defendant in a proper case; and

(iv) there are no special circumstances to enable the discretion to be exercised in favour of the defendant.

The application before me has certain characteristics peculiar to itself thereby taking it out of the ambit of the general rule prohibiting the addition of a co-defendant against the wishes of the plaintiff. The plaintiff had consented to the addition of the 2nd defendant as a party on the application made by the defendant. The statement of claim was accordingly amended to allege negligence against the 2nd defendant who then promptly filed a statement of defence. It is now too late in the day for the plaintiff to resile. I am unable to accept the submission of learned counsel for the plaintiff that he was compelled to consent to the addition of the 2nd defendant as a party by reason of the judgment in *Hee Awa* as the position was clarified in *Tajjul Ariffin* in 1993 and the conduct of the plaintiff thereafter militates against the exercise of the discretion in his favour. I interpolate to add that the reason advanced by the plaintiff that it would be financially advantageous to have the 2nd defendant added as a defendant has already been described as "irrelevant" by the Supreme Court in *Hee Awa.*

In the upshot I dismiss the plaintiff's application with costs for reasons which are peculiar and special to the facts of the application before me.